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No. 85-809

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

ROSALIND M. PLUMMER, ESQUIRE,
Petitioner

v.

GEORGE AMAN, III, et al.,
Respondents

On Petition For a Writ of Certiorari To the United States Court of Appeals For the Third Circuit

BRIEF OF RESPONDENTS, GEORGE AMAN, III, et al., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PERRY S. BECHTLE
LaBrum & Doak
700 IVB Building
1700 Market Street
Philadelphia, Pennsylvania 19103
(215) 561-4400
Attorney for Respondents,
George Aman, III, et al.

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

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PARTIES TO THE PROCEEDING IN THE COURT BELOW

Petitioner, Rosalind M. Plummer, a black female attorney, was the appellant in the court below. Respondents, George Aman, III, *et al.*, certain present and former partners of the law firm of Morgan, Lewis & Bockius, were the appellees in the court below.

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The Respondents, George Aman, III, et al., respectfully request that this Court deny the Petition for A Writ of Certiorari seeking review of the decision of the Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Memorandum Opinion of the United States Court of Appeals for the Third Circuit is set forth in Petitioner's Appendix A. The court below directed that its Memorandum Opinion not be published.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1).

COUNTER-STATEMENT OF THE CASE

On September 22, 1980, Petitioner, Rosalind M. Plummer ("Petitioner" or "Plummer"), a black female lawyer, commenced an action against certain present and former partners of the law firm of Morgan, Lewis & Bockius ("Morgan"), alleging racial and sexual discrimination in connection with her employment as an associate attorney of Morgan. Petitioner was hired by Morgan as an attorney upon her graduation from law school in 1978 and continued in that employment for approximately one year before she resigned in September 1979.

In her Complaint Petitioner alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e - 2000e-17; the Civil Rights Acts of 1866 and 1870, 42 U.S.C. §1981; the Civil Rights Acts of 1861 and 1871, 42 U.S.C. §1985; and the Equal Pay Act, 29 U.S.C. §206(d). Petitioner was originally represented by counsel in the district court. However, on June 22, 1983, almost three years after the commencement of Petitioner's action, she discharged her attorney, and elected to proceed as her own attorney.

After four years of pre-trial discovery, Petitioner's action was tried in August, 1984. Petitioner's claims under 42 U.S.C. §§1981 and 1985, and the Equal Pay Act, 29 U.S.C. §206(d), were tried to a jury; her claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e - 2000e-17, was tried to the court with the jury serving as an advisory jury with respect to that claim. After a trial which lasted almost two weeks, in which Petitioner presented thirteen witnesses, the case was

submitted to the jury on August 15, 1984. The jury returned its verdict by answering written interrogatories on August 16, 1984.

The jury found that Morgan had not discriminated against Petitioner because of her race or sex with respect to her compensation, terms, conditions or privileges of employment. The jury found, further, that there had been no conspiracy among partners of the Firm to deprive Petitioner of equal rights because of her race, and that Morgan had not discriminated against Plummer with respect to wages. Finally, the jury concluded that Morgan had constructively discharged Plummer but specifically found that such discharge was not by reason of her race or sex. Based on the jury's answers to the written interrogatories, the court entered judgment in favor of all Respondents on August 20, 1984, with respect to all claims that were tried to the jury.

Subsequent to the entry of judgment, Petitioner filed a pleading entitled "Plaintiff's Motion for Mistrial and To Show Cause Why Said Motion Should Not be Granted." The court below treated Petitioner's motion as a motion for a new trial under Fed. R. Civ. P. 59. Petitioner's motion was denied by the court in a thorough Opinion dated October 18, 1984 (Appendix F).

On October 16, 1984, the district court entered an Opinion, Findings of Fact, Conclusions of Law, and Order with respect to Petitioner's Title VII claim, which was tried to the court. The court found that Respondents had not discriminated against Petitioner on the basis of her race or sex, with respect to compensation, or any term, condition or privilege of employment. Accordingly, the court entered judgment in favor of Respondents on all claims asserted by Petitioner under Title VII (Appendix C(1)).

Despite the fact that she had failed to submit proposed findings of fact and conclusions of law to the trial judge, Petitioner subsequently filed a motion to amend the court's findings of fact and conclusions of law. In a Memorandum Opinion and Order which was entered on December 3, 1984, the court denied Petitioner's motion.

Petitioner then appealed to the United States Court of Appeals for the Third Circuit. In a Memorandum Opinion dated August 14, 1985, the court below affirmed the entry of judgment against Petitioner (Appendix A). After reviewing the procedural history of this case in great detail, the court rejected all of Petitioner's claims on appeal, stating that it was "convinced that there is no merit in any of the claims raised in [Petitioner's] motion for a new trial." (Appendix A at 12). The court below found, further, that "[w]ith respect to [Petitioner's] claim that the trial judge otherwise exhibited a bias against [Petitioner] throughout the trial, we are satisfied after a review of the record that the trial judge conducted a fair and impartial trial. The portions of the record cited by [Petitioner] simply do not support her claim of bias." (Appendix A at 15). Petitioner has now filed a Petition for a Writ of Certiorari, seeking review by this Court.

COUNTER-STATEMENT OF THE FACTS

Petitioner primarily attacks the integrity and conduct of the trial judge. Despite four years of discovery, and Petitioner's presentation of thirteen witnesses during a trial which lasted almost two weeks, she asserts, without any foundation whatsoever, that she was denied a fair trial. Respondents respond below to each of the main thrusts of Petitioner's factual statement.

1. The Selection of Anna Rogers As A Member Of The Jury And As Foreperson

Petitioner alleges that the trial judge abused his discretion in failing to remove, *sua sponte*, Ms. Anna Rogers as a member of the jury. The facts with respect to the selection of Ms. Rogers as a jury member were addressed at length by the trial judge in his Opinion denying Petitioner's "Motion for Mistrial" and by the Third Circuit in its Memorandum Opinion, and are summarized briefly herein.

In response to questioning by Respondents' counsel on *voir dire*, Ms. Rogers stated that she was familiar with the name of Morgan, Lewis & Bockius. The trial judge then requested to see counsel at sidebar, where he advised Petitioner and counsel for Respondents that he believed Ms. Rogers was his secretary at one time, before he became a judge. The trial judge also advised the parties that "[i]t is up to you whether you want to excuse her or not."

Following this sidebar discussion, in response to further questioning by Respondents' counsel, Ms. Rogers stated that she used to work for the trial judge but that her possible involvement in this matter did not make her uncomfortable. Ms. Rogers also stated that her present employer was a former partner of the law firm representing Respondents and that she was familiar with another partner in that firm. At that point Respondents' counsel suggested that perhaps "fairness would dictate that Mrs. Rogers be excused." The trial judge advised that he would excuse Ms. Rogers "if counsel will agree to that." Petitioner rejected that suggestion, stating, "I have the impression that Mrs. Rogers will probably be as subjective [sic?] as anyone else."

Following the *voir dire* of the jury panel members, the trial judge again discussed Ms. Rogers with the parties at sidebar. During that discussion the trial judge opined that Ms. Rogers "would be very fair." After Petitioner agreed with the judge's assessment, the judge again advised the parties that the question of Ms. Rogers' selection as a juror was "entirely up to you."

The parties then proceeded to exercise their peremptory challenges. Petitioner did not use one of her challenges to strike Ms. Rogers from the panel. Moreover, at no time did Petitioner seek to challenge Ms. Rogers for cause. On the contrary, as is evident from the record, Petitioner stated that she believed that Ms. Rogers would be a fair juror. Even upon the offer by Respondents' counsel and the suggestion of the trial judge, Petitioner declined to agree to having Ms. Rogers excused.

Petitioner also asserts that the trial judge improperly influenced the jury in the selection of Ms. Rogers as foreperson, asserting that the trial judge engaged in "lobbying to secure the selection of Ms. Rogers as jury foreperson." (Petition at 39). This allegation was addressed fully by the trial judge and the court below. The record reveals that the trial judge charged the jury as follows with respect to the selection of a foreperson:

> The manner in which you proceed during your deliberations is a matter which is largely up to you. One of you should be appointed to act as the forelady or the foreman of the jury to [act] as your chairperson during your deliberations . . . ."
>
> Ordinarily, it is the number one juror who acts as the foreperson, but if among yourselves it is decided someone else should act in that capacity, that would be perfectly appropriate and satisfactory.

Petitioner did not object to the foregoing portion of the trial judge's charge regarding the selection of a foreperson, although she had the opportunity to do so. Ms. Rogers, who was the number one juror, was selected by the jury as foreperson during its deliberations.

2. The Trial Judge's Handling Of Pre-trial Discovery Matters

Before this case was tried in August, 1984, the parties engaged in four years of pre-trial discovery. On December 23, 1981, at a conference held in chambers, the district court made certain rulings as to the appropriate scope of discovery. In a Memorandum and Order dated March 20, 1984, the district court summarized its prior rulings as follows:

> 1. Discovery would be limited to a period commencing September, 1975 and ending December 31, 1979 (Plaintiff was employed in September 1978 and resigned in September or October, 1979).
>
> 2. Discovery as to hiring and recruiting practices of the defendant would be precluded, because plaintiff had been recruited and hired and the Complaint contained no valid claim of discrimination in hiring and/or recruiting of plaintiff.
>
> 3. Discovery as to employees of Morgan, Lewis & Bockius would be limited to attorney-associates and paralegals. Plaintiff's sole position with defendants was as an attorney-associate.
>
> 4. Defendants were to respond to relevant discovery, where sought, as to all offices of Morgan, Lewis & Bockius that were in the United States. Plaintiff's sole place of employment was in the Philadelphia office.

5. Defendants were to respond to relevant discovery, where sought, as to Hispanic-surnamed and other recognized minorities. Plaintiff is a black female.

6. Defendants were required to answer Interrogatory 7(d) and 7(e) concerning contracts between Morgan, Lewis & Bockius and the Government. Defendants were not required to provide specific information or copies or produce originals of certain forms identified as EEO-1 reports.

Appendix G

Commencing shortly after the court's original ruling on the scope of discovery, Respondents made available to Petitioner the requested information concerning the name, race, sex and employment history of all associates and paralegals who were employed by Morgan between 1975 and 1979. In addition, Respondents produced at Petitioner's request the personnel and/or evaluation files of numerous individuals who had been employed as associates during the relevant time frame. The court also granted Petitioner's request, after the close of discovery, that she be permitted to take the depositions of fourteen Morgan partners who either worked with Petitioner or participated in decisions regarding her employment. Despite this opportunity, Petitioner chose not to take any of those depositions and, in fact, took only one deposition during the entire litigation. That deposition was of Howard L. Shecter, Morgan's managing partner during Petitioner's tenure.

Despite the district court's clear guidelines concerning the scope of discovery, and Respondents' complete compliance with all discovery requests which fell within these guidelines, Petitioner continued to seek discovery concerning matters previously excluded by the trial

judge. In March 1984, the trial judge denied Petitioner's motion to compel discovery relating to matters which took place prior to 1975. The court concluded at that time:

> A review of the long running disputes over discovery in this case convi[illegible]es me that both plaintiff and defendants have received more than adequate information from the opposing party to fully and properly prepare and present this case for trial.

Appendix G

The court below affirmed the district court's exercise of its discretion with regard to discovery matters.

SUMMARY OF REASONS FOR DENYING THE WRIT

The opinion of the court below, which affirmed the district court's entry of judgment in favor of Respondents, was based upon sound legal principles as to which there is no conflict among the circuit courts or with any decision of this Court. The procedures followed by the district court, which were affirmed by the court below, were consistent with the accepted and usual course of judicial proceedings and do not necessitate an exercise of this Court's power of supervision. Petitioner's disagreement with the decision of the court below lies not with the legal principles articulated by the court but with the factual findings to which those principles were applied. The decision is of importance solely to the litigants to this case and turns on facts unique to this case. Thus, there are no important or compelling reasons for granting the petition.

ARGUMENT

The Petition Should Be Denied For The Reason That The Procedures Followed By The District Court, And Affirmed By The Court Below, Were Consistent With The Accepted and Usual Course Of Judicial Proceedings.

Petitioner does not seek to invoke this Court's jurisdiction on the basis of any conflict among the circuit courts nor does she assert that the legal principles articulated by the court below are in conflict with any decisions of this Court. Instead, Petitioner asserts that the procedures followed by the district court, which were unanimously affirmed by the court below, were such a departure from the accepted and usual course of judicial proceedings as to require the extraordinary exercise of this Court's supervisory powers. It is clear, however, from the opinions of the district court and the court below that the conduct of the district court was scrupulously fair and impartial, and that Petitioner received a full and fair trial upon the merits.

Much of Petitioner's argument is devoted to the selection of Anna Rogers as a member of the jury. Petitioner argues that the district court acted improperly in failing to remove Ms. Rogers from the jury *sua sponte*. A review of the district court's opinion clearly reveals that the trial judge properly exercised his discretion in failing to do so in light of Petitioner's affirmative statements indicating that she was satisified with selecting Ms. Rogers as a juror.

In its opinion denying Petitioner's motion for mistrial, the district court reviewed thoroughly the facts surrounding the selection of Ms. Rogers as a member of the jury:

Specifically, as to Mrs. Roger[s], defense counsel expressly suggested that Mrs. Rogers be excused as a juror, after it became known that she had been a legal secretary and worked in such capacity for me while I was a lawyer; that she knew of the firm of Morgan, Lewis & Bockius; and that she was acquainted with certain of Mr. Bechtle's partners. *Perhaps typically, and possibly deliberately, in order to later claim juror prejudice if she was unsuccessful in the trial, plaintiff would not agree that Mrs. Rogers be excused.* . . . It is quite apparent that because the jury's verdict was unfavorable to plaintiff, she now seeks to set aside the verdict on spurious grounds that, even if they had any merit in fact, could and should have been raised during, not after, the trial so that corrective measures could have been taken if appropriate.

* * *

The selection of Mrs. Rogers as a juror is fully set forth in the trial transcript. Plaintiff did not ask Mrs. Rogers any question concerning her employment, even though the list provided by the clerk's office did not set forth an occupation for Mrs. Rogers. Defense counsel asked if any of the panel members were familiar with the name of Morgan, Lewis & Bockius. Mrs. Rogers stated she was familiar with the name because she was a secretary. At that point, I called counsel to side-bar and explained that when Mrs. Rogers came in the courtroom I thought I recalled that she was a secretary for one of the judges in Bucks County. I further stated that: 'I think she was a secretary for me at one time.' Plaintiff asked if I was sure and I answered correctly that I was not. I then suggested to counsel: 'Ask her who she works for. But I think so. *It is up to you whether you want to*

excuse her or not. But I believe she was the secretary for me at one time or did something—she was in the same law firm. She worked as a secretary.'

Tr. of Aug. 1, 1984 at 29.

Plaintiff's counsel then asked whether this was while I was a practicing lawyer, and I said, 'Yes, when I was practicing law, 15 or 20 years ago or something like that.'

* * *

It is clear beyond a doubt that I brought my prior working relationship with Mrs. Rogers to counsels' attention and informed them it would be up to them whether to excuse her. After further inquiry, Mr. Bechtle suggested that Mrs. Rogers be excused. Plaintiff, however, did not agree. *Had plaintiff agreed to Mr. Bechtle's suggestion, Mrs. Rogers would have been excused.* For plaintiff to now come forward with her allegations concerning Mrs. Rogers, Mr. Bechtle, and myself defies logic.

* * *

In light of the record, plaintiff's contentions regarding Mrs. Rogers' remaining on the jury border on the incredible. I took great care to make sure both counsel were aware of my previous employment relationship with Mrs. Rogers. *Mr. Bechtle offered to have her excused and plaintiff declined.* Further, despite all the knowledge plaintiff had about Mrs. Rogers, she did not use one of her peremptory challenges to challenge Mrs. Rogers and of course did not seek to challenge her for cause. Once again, any perceived prejudice arising because Mrs. Rogers was a juror was entirely self-inflicted.

Appendix F at 11-23 (emphasis added) (footnotes omitted).

It is well settled that the decision whether to seat or excuse jurors is committed to the discretion of the trial court, and that such decisions will be reversed "only if there is a manifest abuse of such discretion." *Vanskike v. ACF Industries*, 665 F.2d 188, 207 (8th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982); *Kinty v. United Mine Workers of America*, 544 F.2d 706 (4th Cir. 1976), *cert. denied*, 429 U.S. 1093 (1977); *Anderson v. Dun & Bradstreet*, 543 F.2d 732 (10th Cir. 1976); *Cox v. General Electric Co.*, 302 F.2d 389 (6th Cir. 1962). Moreover, a party cannot complain of errors "which it has committed, invited, induced the court to make, or to which it consented." *Weise v. United States*, 724 F.2d 587, 590-91 (7th Cir. 1984). The record is clear that Petitioner consented to Mrs. Rogers' selection and expressed her confidence in Mrs. Rogers' ability to be a fair juror. The trial judge advised the parties that, if they agreed, he would excuse Mrs. Rogers. Counsel for Respondents offered to excuse Mrs. Rogers; however, Petitioner rejected that offer. It is simply ludicrous for Petitioner now to suggest that the trial judge acted improperly in failing to remove Mrs. Rogers from the jury *sua sponte*, and that the court below committed error in sanctioning the trial judge's actions. As the court below concluded, "[h]aving thus expressly approved Ms. Rogers as a juror, [Petitioner] cannot now complain about her presence on the jury." (Appendix A at 13).

Equally without merit are Petitioner's other contentions regarding the jury selection process. Prior to the trial, Petitioner requested that each potential juror be sequestered and individually questioned. The trial judge denied this request on the grounds that this procedure would be needlessly time consuming and highly unusual in a civil case. During *voir dire* Petitioner was not precluded from asking any relevant questions. On the contrary, Petitioner was given a full opportunity to question the prospective jurors regarding any possible bias or

prejudice on account of race or sex. As the district court correctly found, Petitioner failed to show any prejudice by being required to question the panel as a group, rather than individually. Fed. R. Civ. P. 47(a) "confers upon the trial judge broad discretion as to the manner in which *voir dire* is conducted and the type and scope of the questions to be asked." *James v. Continental Insurance Co.*, 424 F.2d 1064, 1065 (3d Cir. 1970). The district court's conduct of the *voir dire* was in conformity with the accepted and usual course of judicial proceedings and thus need not be reviewed by this Court.

Petitioner's assertion that she was denied a fair trial because the jury did not include any blacks is without merit. As the trial judge explained in his Opinion denying Petitioner's Motion for Mistrial, the process used for selecting the jury was entirely random, and the placement of prospective jurors in the jury pool was "purely fortuitous." (*See* Appendix F at 34-39).

Petitioner's assertion that the trial judge lobbied to have Mrs. Rogers selected as jury foreperson is frivolous. The record reveals that, contrary to Petitioner's assertion, the trial judge did not instruct the jury that Mrs. Rogers should be selected as foreperson:

> Ordinarily, it is the number one juror who acts as a foreperson, but if among yourselves it is decided someone else should act in that capacity, that would be perfectly appropriate and satisfactory.

The court below found that the district court's comments "speak for themselves." (Appendix A at 14). Petitioner raised no objection to the district court's charge regarding the selection of a foreperson and thus waived her right to assign error to the court's instructions. *See e.g., Holloway v. J.B. Systems, Ltd.*, 609 F.2d 1069 (3d

Cir. 1979) (*per curiam*); *Schwartz v. American Honda Motor Co., Inc.*, 710 F.2d 378 (7th Cir. 1983).

There is also no basis for Petitioner's assertion that this Court must exercise its supervisory powers to review the district court's conduct of discovery. It is well settled that "the conduct of discovery is . . . committed to the discretion of the district court" and that "[t]he substantial discretion granted the trial courts on discovery motions should not be lightly disturbed, even if the reviewing court's notions of fairness would have led it to a different result." *Stich v. United States*, 730 F.2d 115, 117-18 (3d Cir.), *cert. denied*, 105 S. Ct. 294 (1984).

In the instant case, the trial judge's rulings with respect to discovery were consistent with the sound exercise of discretion. Despite the fact that Petitioner was employed solely as an attorney in Morgan's Philadelphia office between September 1978 and September 1979, the district court permitted the Petitioner to take discovery with respect to all attorney-associates and paralegals employed in any of Morgan's United States offices between September 1975 and December 31, 1979. In accordance with the Court's rulings, Respondents made available to Petitioner the name, race, sex and employment history of all such associates and paralegals who were employed by Morgan between 1975 and 1979. Petitioner also requested and was given a copy of the personnel and/or evaluation files of thirty-five associates who were employed during that time frame, including the files of all minority associates who were employed during that period.

Thus, Petitioner's assertion that the trial judge's rulings concerning the scope of discovery precluded her from obtaining evidence regarding Morgan's treatment of other black or female associates is simply contrary to the facts. At the conclusion of the discovery period, the

district court judge denied Petitioner's motion to compel additional discovery stating:

> A review of the long running disputes over discovery in this case convinces me that both plaintiff and defendants have received more than adequate information from the opposing party to fully and properly prepare and present this case for trial.

The district court's conduct of discovery in this case was fully consistent with the sound exercise of discretion and need not be reviewed by this Court.

Finally, Petitioner makes the unfounded assertion that the trial judge's conduct at trial exhibited bias and prejudice. The court below considered Petitioner's assertion and concluded, "we are satisfied after a review of the record that the trial judge conducted a fair and impartial trial. The portions of the record cited by [Petitioner] simply do not support her claim of bias." (Appendix A at 15).

In denying Petitioner's Motion for Mistrial, the district court judge concluded:

> As in all trials, I made a number of evidentiary rulings when counsel made objections. Undoubtedly, some of the rulings were unfavorable to plaintiff as well as to defendants. Whatever rulings were made, they were made to the best of my ability by correctly applying the rules of evidence regardless of the consequences. Plaintiff, who in her testimony described herself as an 'aggressive person,' seems unable to comprehend that an adverse evidentiary ruling does not mean that the trial judge is prejudiced against her.

Appendix F at 41.

There is absolutely no basis for Petitioner's allegations regarding the integrity and conduct of the trial judge. As the court below concluded, a review of the record discloses that Petitioner received a full and fair trial on the merits.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that there are no special or important reasons favoring the exercise of this Court's discretionary power of review. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

PERRY S. BECHTLE
LaBrum & Doak
700 IVB Building
1700 Market Street
Philadelphia, PA 19103

Attorney for Respondents
George Aman, III, et al.